No. 329

In the Supreme Court of the United States

OCTOBER TERM, 1947

ANNE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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OPINION BELOW

The opinion of the circuit court of appeals (R. 218–223) is reported at 162 F. 2d 562.

JURISDICTION

The judgment of the circuit court of appeals was entered June 20, 1947 (R. 223), and a petition for rehearing was denied August 15, 1947 (R. 224). The petition for a writ of certiorari was filed September 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest of petitioner and the search of her room incident thereto.

2. Whether summation by government counsel to which no objection was taken at the trial constituted reversible error.

STATEMENT

Petitioner was convicted on a 4-count indictment returned against her in the United States District Court for the Western District of Washington charging the purchase and concealment of narcotics (R. 2–3, 20–21). She was sentenced to imprisonment for eighteen months and to pay a fine of $250 on the first count and to imprisonment for one day and to pay a fine of $1 on each of the third and fourth counts, the latter sentences of imprisonment to run concurrently with the sentence on the first count. Imposition of sentence was suspended on the second count and petitioner was placed on probation for five years, commencing on the date sentence was imposed (R. 23–26). The judgment was affirmed on appeal (R. 223).

Petitioner moved before trial to suppress the narcotics on which the prosecution was based on the ground that this evidence had been obtained as the result of an unlawful search and seizure

(R. 4–9). In opposition to the motion, the Government submitted affidavits by federal narcotic agents and a detective of the Seattle police department setting forth the following facts (R. 10–16):

On April 8, 1946, the agents received information that unknown persons were smoking opium in the Europe Hotel. Three agents and the detective went to the hotel at about 8:30 p. m. Two of the men entered for the purpose of interviewing the manager. They detected a strong odor of smoking opium which they were easily able to trace to Room 1, the manager's room. They sent for the other agents and one of the men went down the corridor to watch the fire escape. The detective knocked on the door of the room and, in response to a question, identified himself. A few minutes later petitioner opened the door. Since the odor of smoking opium was very strong in the room, the officers placed petitioner under arrest and started to search the room. Petitioner sat down on the bed. Some time later, petitioner's mother entered the room and petitioner stepped into the hallway with the detective. She told him that she would turn over the opium if he would get her mother out of the room. In the meantime, however, one of the agents had turned back the bed covers and discovered in the bed a one-ounce ointment jar containing 85 grains of opium prepared for smoking with no marks or labels, and a makeshift opium pipe which was hot. They also found 23 grains of yen shee (partially

smoked opium, see R. 46–47) lying loose on a Chinese brass tray, a metal lamp base, a metal funnel, and two yen hocks (used for dipping into an opium jar, R. 40).

In support of her motion, petitioner submitted an affidavit in which she stated that she was keeping a suitcase for one Solomon Zissu who had occupied a room in her hotel; that she knew the suitcase contained an opium pipe and that Zissu took opium for his illness; that when the officers knocked on the door she took the pipe out of the suitcase and hid it in her bed; that the officers searched her room for 45 minutes; and that yen shee was discovered in the suitcase, which contained men's clothing (R. 6–9). She also submitted an affidavit by one Kay Doran, who lived in the hotel, to the effect that Doran told the officers that the odor which they smelled was the aroma of incense used by petitioner to keep down the odor from her cats (R. 16–18).

The district court denied the motion to suppress (R. 19–20). At the trial the officers repeated in substance the account of petitioner's arrest and the search set forth in their affidavits (R. 36–47, 79–83, 91–95, 96–99). Petitioner's motions at the trial to exclude the seized narcotics were denied (R. 41, 107, 165). The agents testified that the suitcase which they searched contained women's clothing (R. 88–89, 93–94), that only a few grains of yen shee were found in the suitcase (R. 81, 85, 89, 94), and that the

yen shee which formed the basis of counts 3 and 4 of the indictment was lying loose on a Chinese tray found under the bedcovers with the opium and the pipe (R. 81–82, 85, 98). Petitioner took the stand and repeated in substance the version of events set forth in her affidavit that she had taken the opium and the pipe from the suitcase left with her by Zissu (R. 116–132).

ARGUMENT

Petitioner contends (Pet. 7–8, 12, 13–17) that the officers did not have sufficient probable cause to justify her arrest and the search of her room incident thereto. We submit, however, that, as the court below held (R. 220–221), the arrest was clearly justified. The agents had information that someone was smoking opium in the hotel; the telltale odor of opium led them to petitioner's room; the odor was stronger within the room than without; only petitioner was in the room when the door was opened; no one had left the room, all exits having been under observation. Under these circumstances, the officers had reasonable grounds to believe that petitioner had committed a felony and thus had probable cause to arrest her. *Pong Ying* v. *United States*, 66 F. 2d 67 (C. C. A. 3); *United States* v. *Kronenberg*, 134 F. 2d 483 (C. C. A. 2).

The cases on which petitioner relies (Pet. 15–16) do not for the most part support her position. In *Taylor* v. *United States*, 286 U. S. 1, 6, this Court

expressly recognized that "officers may rely on a distinctive odor as a physical fact indicative of possible crime," but held that this fact would not justify the search of a building without a warrant and without the arrest of any person.[1] The decision in *United States* v. *Lee*, 83 F. 2d 195, 196 (C. C. A. 2), in which the Second Circuit held that the odor of opium is insufficient cause to justify an arrest, stems from a misreading of that portion of this Court's opinion in the *Taylor* case referred to above. Later decisions in the Second Circuit indicate doubts as to correctness of the *Lee* decision. See *Cheng Wai* v. *United States*, 125 F. 2d 915, 916 (C. C. A. 2); *United States* v. *Kronenberg*, 134 F. 2d 483 (C. C. A. 2).

2. Petitioner also contends (Pet. 8, 9, 12, 17–21) that summation by government counsel constituted reversible error, although no exception thereto was taken at the trial. The circuit court of appeals criticized the summation but held that it did not require reversal of petitioner's conviction in view of the absence of objection and the clear proof of petitioner's guilt (R. 221–223).

We submit that the court below properly declined to reverse petitioner's conviction on this ground. The opening argument by government counsel was not objectionable. The reference to burning incense (R. 170–171), of which petitioner complains (Pet. 19), was not extraneous since

[1] In this case the Court said (p. 5): "No one was within the place and there was no reason to think otherwise."

petitioner's counsel had cross-examined one of the agents as to whether Kay Doran had not told him that the odor in the corridor was that of burning incense used to keep down the odors from petitioner's cats (R. 88).[2] The evidence at the trial clearly established that petitioner's version of events was false, and the prosecutor's statements that her story did not hold together (R. 170) and that her credibility could be successfully attacked (R. 172, 173; see Pet. 5) were fully justified.

The portions of the summation which the circuit court of appeals disapproved—statements to the effect that defense counsel had concocted petitioner's defense (see Pet. 5)—occurred in the closing argument by government counsel. They obviously reflect the reaction of the prosecutor to the summation by defense counsel, who accused the agents of shifting their stories (R. 175–177, 190–191), injected extraneous issues into his argument (R. 174, 175–180), and discussed alleged facts not in evidence (R. 186). The first part of government counsel's closing argument, in which he characterized the defense summation as testimony by counsel (R. 192), has considerable basis in the record.

During the argument by defense counsel, and the closing argument by government counsel, the trial judge told the jury to disregard any state-

[2] In connection with her motion to suppress, petitioner had submitted an affidavit by Kay Doran to this effect. See *supra*, p. 4.

ment not supported by the evidence (R. 174–175, 192–193), and he repeated the caution in his charge (R. 207). After the judge concluded his charge, he specifically asked counsel if they had further suggestions or objections, and both counsel replied that there were none (R. 209). Moreover, the evidence of petitioner's guilt was overwhelming. Under the circumstances, therefore, the circuit court of appeals properly held that the argument of government counsel did not constitute reversible error. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–240; *Dunlop* v. *United States*, 165 U. S. 486, 498; *McFarland* v. *United States*, 150 F. 2d 593, 594 (App. D. C.), certiorari denied, 326 U. S. 788; *United States* v. *Dubrin*, 93 F. 2d 499, 506 (C. C. A. 2), certiorari denied, 303 U. S. 646.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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